

(i) The notice is translated orally or by other means to the parent in his or her native language or other mode of communication.

(ii) The parent understands the content of the notice; and

(iii) There is written evidence that the requirements in paragraph B.(7)(i)(A) and paragraph B.(7)(i)(B) of this appendix have been met.

(8) *Independent Educational Evaluation.* A parent of a child (3 through 21 years, inclusive) may be entitled to an independent educational evaluation of the child at the expense of the DoD school system if the parent disagrees with the DoD school system's evaluation of the child.

(i) If a parent requests an independent educational evaluation at the school system's expense, the DoD school system must, without unnecessary delay, either:

(A) Initiate an impartial due process hearing to show that its evaluation is appropriate; or

(B) Ensure an independent evaluation is provided at the DoD school system's expense. Unless the DoD school system demonstrates in an impartial due process hearing that an independent evaluation obtained by the parent did not meet DoD school system criteria. In such cases, the parents must bear the cost of the evaluation.

(ii) If the DoD school system initiates a hearing and the decision is that the DoD school system's evaluation is appropriate, the parents still have the right to an independent evaluation, but not at the school system's expense.

(iii) An independent educational evaluation provided at the DoD school system's expense must do the following:

(A) Conform to the requirements of this part.

(B) Be conducted, when possible, in the area where the child resides.

(C) Meet DoD standards governing persons qualified to conduct an educational evaluation, including an evaluation for related services.

(9) The DoD school system, the CSC, and a hearing officer appointed under this part shall consider any evaluation report presented by a parent.

(10) *Access to Records.* The parents of a child with a disability shall be afforded an opportunity to inspect and review educational records about the identification, evaluation, and educational placement of the child, and the provision of a free public education for the child.

(11) *Due Process Rights.* (i) The parent of a child with a disability, the Military Department, or the DoD school system has the opportunity to file a written petition for an impartial due process hearing under appendix G of this part. The petition may concern issues affecting a particular child's identi-

fication, evaluation, or placement, or the provision of EIS or a free and appropriate public education.

(ii) While an impartial due process hearing or judicial proceeding is pending, unless the EDIS or the DoD school system and the parent of the child agree otherwise, the child shall remain in his or her present educational setting, subject to the disciplinary procedures prescribed in section H of appendix B of this part.

(12) *Transfer of Parental Rights at Age of Majority.* (i) In the DoD school systems, a child reaches the age of majority at age 18.

(ii) When a child with a disability reaches the age of majority (except for a child with a disability who has been determined to be incompetent under State law) the rights accorded to parents under this Part transfer to the child.

(iii) When a child reaches the age of majority, the DoD school system shall notify the individual and the parents of the transfer of rights.

(iv) When a child with a disability who has reached the age of majority, who has not been determined to be incompetent, but who does not have the ability to provide informed consent with respect to his or her educational program, the Department of Defense shall establish procedures for appointing the parent of the child to represent the educational interests of the child throughout the period of eligibility for special education services.

#### APPENDIX G TO PART 57—MEDIATION AND HEARING PROCEDURES

##### A. PURPOSE

This appendix establishes requirements for the resolution of conflicts through mediation and impartial due process hearings. Parents of infants, toddlers, and children who are covered by this Part and, as the case may be, the cognizant Military Medical Department or the DoD school system are afforded impartial mediation and/or impartial due process hearings and administrative appeals about the provision of EIS, or the identification, evaluation, educational placement of, and the FAPE provided to, such children by the Department of Defense, in accordance with sections 927 and 1400 of 20 U.S.C. and section 2164 of 10 U.S.C.

##### B. MEDIATION

(1) Mediation may be initiated by either a parent or the Military Medical Department concerned or the DoD school system to resolve informally a disagreement on any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to such child.

(i) The DoD school system shall participate in mediation involving special education and related services.

(ii) The cognizant Military Medical Department shall participate in mediation involving EIS.

(2) The party initiating mediation must notify the other party to the mediation of its request to mediate. The initiating party's request must be written, include a written description of the dispute and bear the signature of the requesting party. Formal acknowledgement of the request for mediation shall occur in a timely manner. The parties may jointly request mediation.

(3) Upon agreement of the parties to mediate a dispute, the Military Medical Department or DoD school shall forward a request for a mediator to higher headquarters, or request a mediator through the Director, Defense Office of Hearings and Appeals (DOHA).

(i) The cognizant DoDDS Area Special Education Coordinator or the DDESS District Superintendent shall promptly appoint a mediator. The Director, DOHA, through the DOHA Office of Alternate Dispute Resolution (ADR), shall maintain a roster of mediators trained in ADR methods, knowledgeable in laws and regulations related to special education, and available to mediate disputes upon request. When requested, the Director, DOHA, through the Office of ADR, shall appoint a mediator within 15 business days of receiving the request for a due process hearing, unless a party provides written notice to the Director, DOHA that the party refuses to participate in mediation.

(ii) The mediator assigned to a dispute shall not be employed by the Military Medical Department or the DoD school system involved, unless the parties agree otherwise.

(4) Unless both parties agree otherwise, mediation shall commence in a timely manner after both parties agree to mediation.

(5) The parents of the infant, toddler or child and 2 representatives of the EDIS or DoD school may participate in mediation. With the consent of both parties, other persons may participate in mediation. Either party may recess a mediation session to consult advisors, whether or not present, or to consult privately with the mediator.

(6) If the parties resolve the dispute or a portion of the dispute, or agree to use another procedure to resolve the dispute, the mediator shall ensure that the resolution or agreement is reduced to writing and that it is signed and dated by the parties and that a copy is given to each party. The resolution or agreement is legally binding upon the parties.

(7) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Unless the parties and the mediator agree, no person may record a mediation session, nor

should any written notes be taken from the room by either party. The mediator may require the parties to sign a confidentiality pledge before the commencement of mediation.

(8) Parents must be provided an opportunity to meet with appropriate EDIS or DoD school system staff in at least one mediation session, if they request a due process hearing in accordance with sections A through H of this appendix. The parents and the Military Medical Department or DoD school system must participate in mediation, unless a party objects to mediation.

(9) Mediation shall not delay hearings or appeals related to the dispute. All mediation sessions shall be held in a location that is convenient to the parties. The Military Medical Department in mediations concerning EIS or the DoD school system in mediations concerning special education and related services shall bear the cost of the mediation process.

(10) Any hearing officer or adjudicative body may draw no negative inference from the fact that a mediator or a party withdrew from mediation or that mediation did not result in settlement of a dispute.

#### C. HEARING ADMINISTRATION

(1) The Defense Office of Hearings and Appeals (DOHA) shall have administrative responsibility for the proceedings authorized by sections D through H of this appendix.

(2) This appendix shall be administered to ensure that the findings, judgments, and determinations made are prompt, fair, and impartial.

(3) Impartial hearing officers, who shall be DOHA Administrative Judges, shall be appointed by the Director, DOHA, and shall be attorneys in good standing of the bar of any State, the District of Columbia, or a commonwealth, territory or possession of the United States, who are also independent of the DoD school system or the Military Medical Department concerned in proceedings conducted under this appendix. A parent shall have the right to be represented in such proceedings by counsel or by persons with special knowledge or training with respect to the challenges of individuals with disabilities. The DOHA Department Counsel normally shall appear and represent the DoD school system in proceedings conducted under this appendix, when such proceedings involve a child age 3 to 21, inclusive. When an infant or toddler is involved, the Military Medical Department responsible under this part for delivering EIS shall either provide its own counsel or request counsel from the DOHA.

#### D. HEARING PRACTICE AND PROCEDURE

(1) *Hearing.* (i) Should mediation be refused or otherwise fail to resolve the issues on the

provision of EIS to an infant or toddler or the identification or evaluation of such an individual, the parent may request and shall receive a hearing before a hearing officer to resolve the matter. The parents of an infant or toddler and the Military Medical Department concerned shall be the only parties to a hearing conducted under this appendix.

(ii) Should mediation be refused or otherwise fail to resolve the issues on the provision of a FAPE to a child with a disability, age 3 to 21, inclusive, or the identification, evaluation, or educational placement of such an individual, the parent or the school principal, for the DoD school system, may request and shall receive a hearing before a hearing officer to resolve the matter. The parents of a child age 3 to 21, inclusive, and the DoD school system shall be the only parties to a hearing conducted under this appendix.

(2) The parents and the Military Medical Department or DoD school system must have an opportunity to obtain an impartial due process hearing, if the parents object to:

(i) A proposed formal educational assessment or proposed denial of a formal educational assessment of their child.

(ii) The proposed placement of their child in, or transfer of their child to a special education program.

(iii) The proposed denial of placement of their child in a special education program or the transfer of their child from a special education program.

(iv) The proposed provision or addition of special education services for their child; or

(v) The proposed denial or removal of special education services for their child.

(3) The parent or the attorney representing the child shall include in the petition, the name of the child, the address of the residence of the child, the name of the school the child is attending, a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including the facts relating to the problem, and a proposed resolution of the problem to the extent known and available to the parents at the time.

(4) The DoD school system may file a written petition for a hearing to override a parent's refusal to grant consent for an initial evaluation, a reevaluation or an initial educational placement of the child. The DoD school system may also file a written petition for a hearing to override a parent's refusal to accept an IEP.

(5) The party seeking the hearing shall submit the petition to the Director, DOHA, at P.O. Box 3656, Arlington, Virginia 22203. The petitioner shall deliver a copy of the petition to the opposing party (*i.e.*, the parent or the school principal, for the DoD school system, or the military MTF commander, for the Military Medical Department), either in person or by first-class mail, postage pre-

paid. Delivery is complete on mailing. When the DoD school system or the Military Medical Department petitions for a hearing, it shall inform the other parties of the deadline for filing an answer under paragraph D.(6) of this appendix and shall provide the other parties with a copy of this part.

(6) An opposing party shall submit an answer to the petition to the Director, DOHA, with a copy to the petitioner, at the latest by the 15th business day after receipt of the petition. The answer shall be as full and complete as possible, addressing the issues, facts, and proposed relief. The submission of the answer is complete upon mailing.

(7) By 10 business days after receipt of the petition, the Director, DOHA, shall assign a hearing officer, who then shall have jurisdiction over the resulting proceedings. The Director, DOHA, shall forward all pleadings to the hearing officer.

(8) The party requesting the hearing shall plead with specificity as to what issues are in dispute and all issues not specifically pleaded with specificity is deemed waived. Parties must limit evidence to the issues specifically pleaded. A party may amend a pleading if the amendment is filed with the hearing officer and is received by the other parties at least 10 business days before the hearing.

(9) The Director, DOHA, shall arrange for the time and place of the hearing, and shall provide administrative support. The hearing shall be held in the DoD school district attended by the child or at the military base location of the EDIS clinic, unless the parties agree otherwise or upon a showing of good cause.

(10) The purpose of a hearing is to establish the relevant facts necessary for the hearing officer to reach a fair and impartial determination of the case. Oral and documentary evidence that is relevant and material may be received. The technical rules of evidence shall be relaxed to permit the development of a full evidentiary record with the Federal Rules of Evidence, title 28, United States Code serving as guide.

(11) The hearing officer shall be the presiding officer, with judicial powers to manage the proceeding and conduct the hearing. Those powers shall include the authority to order an independent evaluation of the child at the expense of the DoD school system or the Military Medical Department concerned and to call and question witnesses.

(12) Those normally authorized to attend a hearing shall be the parents of the individual with disabilities, the counsel or personal representative of the parents, the counsel and professional employees of the DoDDS or the Military Medical Department concerned, the hearing officer, and a person qualified to transcribe or record the proceedings. The hearing officer may permit other persons to

attend the hearing, consistent with the privacy interests of the parents and the individual with disabilities. The parents have the right to an open hearing on waiving in writing their privacy rights and those of the individual with disabilities who is the subject of the hearing.

(13) A verbatim transcription of the hearing shall be made in written or electronic form and shall become a permanent part of the record. A copy of the written transcript or electronic record of the hearing shall be made available to a parent on request and without cost. The hearing officer may allow corrections to the written transcript or electronic recording for conforming it to actual testimony after adequate notice of such changes is given to all parties.

(14) The hearing officer's decision of the case shall be based on the record, which shall include the petition, the answer, the written transcript or the electronic recording of the hearing, exhibits admitted into evidence, pleadings or correspondence properly filed and served on all parties, and such other matters as the hearing officer may include in the record, if such matter is made available to all parties before the record is closed under paragraph D.(16) of this appendix.

(15) The hearing officer shall make a full and complete record of a case presented for adjudication.

(16) The hearing officer shall decide when the record in a case is closed.

(17) The hearing officer shall issue findings of fact and conclusions of law in a case not later than 50 business days after being assigned to the case, unless a request for discovery is made by either party, as provided for in paragraph D.(5) of this appendix in which case the time required for such discovery does not count toward the 50 business days. The hearing officer may grant a specific extension of time for good cause either on his or her own motion or at the request of either party. Good cause includes the time required for mediation under section B of this appendix. If the hearing officer grants an extension of time, he or she shall identify the length of the extension and the reason for the extension in the record of the proceeding.

#### E. DISCOVERY

(1) Full discovery shall be available to parties to the proceeding, with the Federal Rules of Civil Procedure, Rules 26-37, codified at 28 U.S.C. serving as a guide.

(2) If voluntary discovery cannot be accomplished, a party seeking discovery may file a motion with the hearing officer to accomplish discovery. The hearing officer shall grant an order to accomplish discovery upon a showing that the requested evidence is relevant and necessary. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presen-

tation of the case in some positive way on a matter in issue. A matter is not in issue when it is admitted or stipulated as a fact. An order granting discovery shall be enforceable as is an order compelling testimony or the production of evidence.

(3) Records compiled or created in the regular course of business, which have been provided to a party prior to hearing in accordance with paragraph E.(2) of this appendix may be received and considered by the officer without authenticating witnesses.

#### F. WITNESSES; PRODUCTION OF EVIDENCE

(1) All witnesses testifying at the hearing shall be advised that it is a criminal offense knowingly and willfully to make a false statement or representation to a Department or Agency of the U.S. Government as to any matter in the jurisdiction of that Department or Agency. All witnesses shall be subject to cross-examination by the parties.

(2) A party calling a witness shall bear the witness' travel and incidental expenses associated with testifying at the hearing. The DoD school system or the Military Medical Department concerned shall pay such expenses when a witness is called by the hearing officer.

(3) The hearing officer may issue an order compelling the attendance of witnesses or the production of evidence on the hearing officer's own motion or, if good cause can be shown, on motion of either party.

(4) When the hearing officer determines that a person has failed to obey an order to testify or to produce evidence, and such failure is in knowing and willful disregard of the order, the hearing officer shall so certify.

(5) The party or the hearing officer seeking to compel testimony or the production of evidence may, based on the certification provided for in paragraph F.(4) of this appendix file an appropriate action in a court of competent jurisdiction to compel compliance with the hearing officer's order.

(6) At least 5 business days prior to a hearing, the parties shall exchange lists of all documents and materials that each party intends to use at the hearing, including all evaluations and reports. Each party also shall disclose the names of all witnesses it intends to call at hearing along with a proffer of the anticipated testimony of each witness.

(7) At least 10 business days in advance of hearing, each party must provide the name, title, curriculum vitae, and summary of proposed testimony of any expert witness it intends to call at hearing.

(8) Failure to disclose documents, materials, or witnesses pursuant to paragraphs F.(6) and F.(7) of this appendix may result in the hearing officer barring their introduction at the hearing.

## G. HEARING OFFICER'S FINDINGS OF FACT AND DECISION

(1) The hearing officer shall make written findings of fact and shall issue a decision setting forth the questions presented, the resolution of those questions, and the rationale for the resolution. The hearing officer shall file the findings of fact and decision with the Director, DOHA, with a copy to the parties.

(2) The Director, DOHA, shall forward to the Director, of the DoD school system, or to the Military Medical Department concerned, copies with all personally identifiable information deleted, of the hearing officer's findings of fact and decision or, in cases that are administratively appealed, of the final decision of the DOHA Appeal Board.

(3) The findings of fact and decision of the hearing officer shall become final unless a notice of appeal is filed under section I of this appendix. The DoD school system or the Military Medical Department concerned shall implement the decision as soon as practicable after it becomes final.

## H. DETERMINATION WITHOUT HEARING

(1) At the request of a parent of an infant, toddler, or child age 3 to 21, inclusive, when early intervention or special educational (including related) services are at issue, the requirement for a hearing may be waived, and the case may be submitted to the hearing officer on written documents filed by the parties. The hearing officer shall make findings of fact and conclusions of law in the period fixed by paragraph D.(17) of this appendix.

(2) The DoD school system or the Military Medical Department concerned may oppose a request to waive a hearing. In that event, the hearing officer shall rule on that request.

(3) Documents submitted to the hearing officer in a case determined without a hearing shall comply with paragraph F.(6) of this appendix. A party submitting such documents shall provide copies to all other parties.

## I. APPEAL

(1) A party may appeal the hearing officer's findings of fact and decision by filing a written notice of appeal with the Director, DOHA, at P.O. Box 3656, Arlington, Virginia 22203, within 15 business days of receipt of the findings of fact and conclusions of law. The notice of appeal must contain the appellant's certification that a copy of the notice of appeal has been provided to all other parties. Filing is complete on mailing.

(2) Within 30 business days of receipt of the notice of appeal, the appellant shall submit a written statement of issues and arguments to the Director, DOHA, with a copy to the other parties. The other parties shall submit a reply or replies to the Director, DOHA, within 20 business days of receiving the statement, and shall deliver a copy of each

reply to the appellant. Submission is complete on mailing.

(3) The Director, DOHA, shall refer the matter on appeal to the DOHA Appeal Board. It shall determine the matter, including the making of interlocutory rulings, within 45 business days of receiving timely submitted replies under paragraph I.(2) of this appendix.

(4) The determination of the DOHA Appeal Board shall be a final administrative decision and shall be in written form. It shall address the issues presented and set forth a rationale for the decision reached. A determination denying the appeal of a parent in whole or in part shall state that the parent has the right under sections 921-932 and chapter 33 of title 20, United States Code to bring a civil action on the matters in dispute in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

(5) No provision of this part or other DoD guidance may be construed as conferring a further right of administrative review. A party must exhaust all administrative remedies afforded by this appendix before seeking judicial review of a determination made under this appendix.

## J. PUBLICATION AND INDEXING OF FINAL DECISIONS

The Director, DOHA, shall ensure that final decisions in cases arising under this appendix are published and indexed to protect the privacy rights of the parents who are parties in those cases and the children of such parents, in accordance with DoD Directive 5400.11.

## APPENDIX H TO PART 57—MONITORING

## A. MONITORING

(1) The DoDEA and the Military Medical Departments shall establish procedures for monitoring special services requiring:

(i) Periodic on-site monitoring at each administrative level.

(ii) The DoD school systems to report annually that the provision of special education and related services is in compliance with this part.

(iii) The Military Medical Departments to report annually that the provision of EIS is in compliance with this part.

(2) The Director, DoDEA, and the Surgeons General of the Military Medical Departments shall submit reports to the DoD-CC not later than July 31 each year that summarize the status of compliance. The reports shall:

(i) Identify procedures conducted at Headquarters and at each subordinate level, including on-site visits, to evaluate compliance with this part.

(ii) Summarize the findings.